APPENDIX A

The Third Amendment to the United States Constitution provides:

> "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "[No person] shall be compelled in any criminal case to be a witness against himself. . . ."

The Ninth Amendment to the United States Constitution provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Section 559 of the Iowa Probate Code, Iowa Code § 633.559, enacted in 1963, provides in pertinent part:

> "The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian. . . ."

Former Section 668.1 of the Iowa Code, repealed at the same time that § 633.559 was enacted, provided:

"Parents are the natural guardians of the persons of their minor children, and equally entitled to their care and custody."

Former Section 668.2 of the Iowa Code, also repealed at the time that Section 633.559 was enacted, provided:

"The surviving parent becomes such guardian, but if there is none, the district court shall appoint one, who shall have the same power and control over his ward as the parents would have, if living."

Rule 344(f)(15) of the Iowa Rules of Civil Procedure, promulgated by the Iowa Supreme Court, and dealing with the content of briefs in that court, provides:

"(f) The following propositions are deemed so well established that authorities need not be cited in support of any of them:

* * *

"(15) In child custody cases the first and governing consideration of the courts must be the best interest of the child.

Section 684.18 of the Iowa Code provides:

"The supreme court shall have the power to prescribe all rules of pleading, practice and procedure, and the forms of process, writs and notices, for all proceedings of a civil nature in all courts of this state, for the purpose of simplifying the same, and of promoting the speedy determination of litigation upon its merits. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

APPENDIX B

IN THE SUPREME COURT OF IOWA

251

51974

MARK WENDELL PAINTER, a Minor,
by HAROLD W. PAINTER, his Father and Next Friend,
Appellee,

v.

DWIGHT BANNISTER and MARGARET BANNISTER,
Husband and Wife,
Appellants.

Appeal from Story District Court—Ed J. Kelley, Judge.

* * *

STUART, J.

We are here setting the course for Mark Wendell Painter's future. Our decision on the custody of this 7 year old boy will have a marked influence on his whole life. The fact that we are called upon many times a year to determine custody matters does not make the exercising of this awesome responsibility any less difficult. Legal training and experience are of little practical help in solving the complex problems of human relations. However, these problems do arise and under our system of government, the burden of rendering a final decision rests upon us. It is frustrating to know we can only resolve, not solve, these unfortunate situations.

The custody dispute before us in this habeas corpus action is between the father, Harold Painter, and the maternal grandparents, Dwight and Margaret Bannister. Mark's mother and younger sister were killed in an auto-

mobile accident on December 6, 1962 near Pullman, Washington. The father, after other arrangements for Mark's care had proved unsatisfactory, asked the Bannisters, to take care of Mark. They went to California and brought Mark to their farm home near Ames in July, 1963. Mr. Painter remarried in November, 1964 and about that time indicated he wanted to take Mark back. The Bannisters refused to let him leave and this action was filed in June, 1965. Since July 1965 he has continued to remain in the Bannister home under an order of this court staying execution of the judgment of the trial court awarding custody to the father until the matter could be determined on appeal. For reasons hereinafter stated, we conclude Mark's better interests will be served if he remains with the Bannisters.

Mark's parents came from highly contrasting backgrounds. His mother was born, raised and educated in rural Iowa. Her parents are college graduates. Her father is agricultural information editor for the Iowa State University Extension Service. The Bannister home is in the Gilbert Community and is well kept, roomy and comfortable. The Bannisters are highly respected members of the community. Mr. Bannister has served on the school board and regularly teaches a Sunday school class at the Gilbert Congregational Church. Mark's mother graduated from Grinnell College. She then went to work for a newspaper in Anchorage, Alaska, where she met Harold Painter.

Mark's father was born in California. When he was 2½ years old, his parents were divorced and he was placed in a foster home. Although he has kept in contact with his natural parents, he considers his foster parents, the McNelly's as his family. He flunked out of a high school and a trade school because of a lack of interest in academic subjects, rather than any lack of ability. He joined the navy at 17. He did not like it. After receiving an honorable discharge, he took examinations and obtained his high school diploma. He lived with the McNelly's and went to college for 2½ years under the G.I. bill. He quit college to take a job on a small newspaper in Ephrata, Washington in

November 1955. In May 1956, he went to work for the newspaper in Anchorage which employed Jeanne Bannister.

Harold and Jeanne were married in April, 1957. Although there is a conflict in the evidence on the point, we are convinced the marriage, overall, was a happy one, with many ups and downs as could be expected in the uniting of two such opposites.

We are not confronted with a situation where one of the contesting parties is not a fit or proper person. There is no criticism of either the Bannisters or their home. There is no suggestion in the record that Mr. Painter is morally unfit. It is obvious the Bannisters did not approve of their daughter's marriage to Harold Painter and do not want their grandchild raised under his guidance. The philosophies of life are entirely different. As stated by the psychiatrist who examined Mr. Painter at the request of Bannisters' attorneys: "It is evident that there exists a large difference in ways of life and value systems between the Bannisters and Mr. Painter, but in this case, there is no evidence that psychiatric instability is involved. Rather, these divergent life patterns seem to represent alternative normal adaptations."

It is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so. However, the philosphies are important as they relate to Mark and his particular needs.

The Bannister home provides Mark with a stable, dependable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it. It provides a solid foundation and secure atmosphere. In the Painter home, Mark would have more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challenging in many respects, but romantic, impractical and unstable.

Little additional recitation of evidence is necessary to support our evaluation of the Bannister home. It might be

pointed out, however, that Jeanne's three sisters also received college educations and seem to be happily married to college graduates.

Our conclusion as to the type of home Mr. Painter would offer is based upon his Bohemian approach to finances and life in general. We feel there is much evidence which supports this conclusion. His main ambition is to be a free lance writer and photographer. He has had some articles and picture stories published, but the income from these efforts has been negligible. At the time of the accident, Jeanne was willingly working to support the family so Harold could devote more time to his writing and photography. In the 10 years since he left college, he has changed jobs seven times. He was asked to leave two of them; two he quit because he didn't like the work; two because he wanted to devote more time to writing and the rest for better pay. He was contemplating a move to Berkeley at the time of trial. His attitude toward his career is typified by his own comments concerning a job offer:

"About the Portland news job, I hope you understand when I say it took guts not to take it; I had to get behind myself and push. It was very, very tempting to accept a good salary and settle down to a steady, easy routine. As I approached Portland, with the intention of taking the job, I began to ask what, in the long run, would be the good of this job: 1, it was not *really* what I wanted; 2, Portland is just another big farm town, with none of the stimulation it takes to get my mind sparking. Anyway, I decided Mark and myself would be better off if I went ahead with what I've started and the hell with the rest, sink, swim or starve."

There is general agreement that Mr. Painter needs help with his finances. Both Jeanne and Marilyn, his present wife, handled most of them. Purchases and sales of books, boats, photographic equipment and houses indicate poor financial judgment and an easy come easy go attitude. He dissipated his wife's estate of about $4300, most of which was a gift from her parents and which she had hoped would be used for the children's education.

The psychiatrist classifies him as "a romantic and somewhat of a dreamer". An apt example are the plans he related for himself and Mark in February 1963: "My thought now is to settle Mark and myself in Sausilito, near San Francisco; this is a retreat for wealthy artists, writers, and such aspiring artists and writers as can fork up the rent money. My plan is to do expensive portraits ($150 and up), sell prints ($15 and up) to the tourists who flock in from all over the world * * *."

The house in which Mr. Painter and his present wife live, compared with the well kept Bannister home, exemplifies the contrasting ways of life. In his words "it is a very old and beat up and lovely home * * *". They live in the rear part. The interior is inexpensively but tastefully decorated. The large yard on a hill in the business district of Walnut Creek, California, is of uncut weeds and wild oats. The house "is not painted on the outside because I do not want it painted. I am very fond of the wood on the outside of the house."

The present Mrs. Painter has her master's degree in cinema design and apparently likes and has had considerable contact with children. She is anxious to have Mark in her home. Everything indicates she would provide a leveling influence on Mr. Painter and could ably care for Mark.

Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism and "has been very much influenced by it". Mrs. Painter is Roman Catholic. They plan to send Mark to a Congregational Church near the Catholic Church, on an irregular schedule.

He is a political liberal and got into difficulty in a job at the University of Washington for his support of the activities of the American Civil Liberties Union in the university news bulletin.

There were "two funerals" for his wife. One in the basement of his home in which he alone was present. He conducted the service and wrote her a long letter. The second

at a church in Pullman was for the gratification of her friends. He attended in a sport shirt and sweater.

These matters are not related as a criticism of Mr. Painter's conduct, way of life or sense of values. An individual is free to choose his own values, within bounds, which are not exceeded here. They do serve however to support our conclusion as to the kind of life Mark would be exposed to in the Painter household. We believe it would be unstable, unconventional, arty, Bohemian, and probably intellectually stimulating.

Were the question simply which household would be the most suitable in which to raise a child, we would have unhesitatingly chosen the Bannister home. We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child. There are, however, several factors which have made us pause.

First, there is the presumption of parental preference, which though weakened in the past several years, exists by statute. Code of Iowa, Section 668.1; Finken v. Porter, 246 Iowa 1345, 72 N.W. 2d 445; Kouris v. Lunn, Iowa , 136 N.W. 2d 502; Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 1399, 121 N.W. 2d 216. We have a great deal of sympathy for a father, who in the difficult period of adjustment following his wife's death, turns to the maternal grandparents for their help and then finds them unwilling to return the child. There is no merit in the Bannister claim that Mr. Painter permanently relinquished custody. It was intended to be a temporary arrangement. A father should be encouraged to look for help with the children from those who love them without the risk of thereby losing the custody of the children permanently. This fact must receive consideration in cases of this kind. However, as always, the primary consideration is the best interest of the child and if the return of custody to the father is likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail. Vanden Heuvel v. Vanden Heuval, supra; In re Guardianship of Plucar, 247

Iowa 394, 403, 72 N.W. 2d 455; Carrere v. Prunty, Iowa , 133 N.W. 2d 692, 696; Finken v. Porter, supra; Kouris v. Lunn, supra, R.C.P. 344(F) 15.

Second, Jeanne's will named her husband guardian of her children and if he failed to qualify or ceased to act, named her mother. The parent's wishes are entitled to consideration. Finken v. Porter, supra.

Third, the Bannister's are 60 years old. By the time Mark graduates from high school they will be over 70 years old. Care of young children is a strain on grandparents and Mrs. Bannister's letters indicate as much.

We have considered all of these factors and have concluded that Mark's best interest demands that his custody remain with the Bannisters. Mark was five when he came to their home. The evidence clearly shows he was not well adjusted at that time. He did not distinguish fact from fiction and was inclined to tell "tall tales" emphasizing the big "I". He was very aggressive toward smaller children, cruel to animals, not liked by his classmates and did not seem to know what was acceptable conduct. As stated by one witness: "Mark knew where his freedom was and he didn't know where his boundaries were." In two years he made a great deal of improvement. He now appears to be well disciplined, happy, relatively secure and popular with his classmates, although still subject to more than normal anxiety.

We place a great deal of reliance on the testimony of Dr. Glenn R. Hawks, a child psychologist. The trial court, in effect, disregarded Dr. Hawks' opinions stating: "The court has given full consideration to the good doctor's testimony, but cannot accept it at full face value because of exaggerated statements and the witness' attitude on the stand." We, of course, do not have the advantage of viewing the witness' conduct on the stand, but we have carefully reviewed his testimony and find nothing in the written record to justify such a summary dismissal of the opinions of this eminent child psychologist.

Dr. Hawks is head of the Department of Child Development at Iowa State University. However, there is nothing in the record which suggests that his relationship with the Bannisters is such that his professional opinion would be influenced thereby. Child development is his specialty and he has written many articles and a textbook on the subject. He is recognized nationally, having served on the staff of the 1960 White House Conference on Children and Youth and as consultant on a Ford Foundation program concerning youth in India. He is now education consultant on the project "Head Start". He has taught and lectured at many universities and belongs to many professional associations. He works with the Iowa Children's Home Society in placement problems. Further detailing of his qualifications is unnecessary.

Between June 15th and the time of trial, he spent approximately 25 hours acquiring information about Mark and the Bannisters, including appropriate testing of and "depth interviews" with Mark. Dr. Hawks' testimony covers 70 pages of the record and it is difficult to pinpoint any bit of testimony which precisely summarizes his opinion. He places great emphasis on the "father figure" and discounts the importance of the "biological father". "The father figure is a figure that the child sees as an authority figure, as a helper, he is a nutrient figure, and one who typifies maleness and stands as maleness as far as the child is concerned."

His investigation revealed: "* * * the strength of the father figure before Mark came to the Bannisters is very unclear. Mark is confused about the father figure prior to his contact with Mr. Bannister." Now, "Mark used Mr. Bannister as his father figure. This is very evident. It shows up in the depth interview, and it shows up in the description of Mark's life given by Mark. He has a very warm feeling for Mr. Bannister."

Dr. Hawks concluded that it was not for Mark's best interest to be removed from the Bannister home. He is

criticized for reaching this conclusion without investigating the Painter home or finding out more about Mr. Painter's character. He answered:

"I was most concerned about the welfare of the child, not the welfare of Mr. Painter, not about the welfare of the Bannisters. In as much as Mark has already made an adjustment and sees the Bannisters as his parental figures in his psychological makeup, to me this is the most critical factor. Disruption at this point, I think, would be detrimental to the child even tho Mr. Painter might well be a paragon of virtue. I think this would be a kind of thing which would not be in the best interest of the child. I think knowing something about where the child is at the present time is vital. I think something about where he might go, in my way of thinking is essentially untenable to me, and relatively unimportant. It isn't even helpful. The thing I was most concerned about was Mark's view of his own reality in which he presently lives. If this is destroyed I think it will have rather bad effects on Mark. I think then if one were to make a determination whether it would be to the parents' household, or the McNelly household, or X-household, then I think the further study would be appropriate."

Dr. Hawks stated: "I am appalled at the tremendous task Mr. Painter would have if Mark were to return to him because he has got to build the relationship from scratch. There is essentially nothing on which to build at the present time. Mark is aware Mr. Painter is his father, but he is not very clear about what this means. In his own mind the father figure is Mr. Bannister. I think it would take a very strong person with everything in his favor in order to build a relationship as Mr. Painter would have to build at this point with Mark."

It was Dr. Hawks' opinion "the chances are very high (Mark) will go wrong if he is returned to his father". This is based on adoption studies which "establish that the majority of adoptions in children who are changed, from

ages six to eight, will go bad, if they have had a prior history of instability, some history of prior movement. When I refer to instability I am referring to where there has been no attempt to establish a strong relationship." Although this is not an adoption, the analogy seems appropriate, for Mark who had a history of instability would be removed from the only home in which he has a clearly established "father figure" and placed with his natural father about whom his feelings are unclear.

We know more of Mr. Painter's way of life than Dr. Hawks. We have concluded that it does not offer as great a stability or security as the Bannister home. Throughout his testimony he emphasized Mark's need at this critical time is stability. He has it in the Bannister home.

Other items of Dr. Hawks' testimony which have a bearing on our decision follow. He did not consider the Bannisters' age anyway disqualifying. He was of the opinion that Mark could adjust to a change more easily later on, if one became necessary, when he would have better control over his environment.

He believes the presence of other children in the home would have a detrimental effect upon Mark's adjustment whether this occurred in the Bannister home or the Painter home.

The trial court does not say which of Dr. Hawks' statements he felt were exaggerated. We were most surprised at the inconsequential position to which he relegated the "biological father". He concedes "child psychologists are less concerned about natural parents than probably other professional groups are." We are not inclined to so lightly value the role of the natural father, but find much reason for his evaluation of this particular case.

Mark has established a father-son relationship with Mr. Bannister, which he apparently had never had with his natural father. He is happy, well adjusted and progressing nicely in his development. We do not believe it is for Mark's best interest to take him out of this stable atmos-

phere in the face of warnings of dire consequences from an eminent child psychologist and send him to an uncertain future in his father's home. Regardless of our appreciation of the father's love for his child and his desire to have him with him, we do not believe we have the moral right to gamble with this child's future. He should be encouraged in every way possible to know his father. We are sure there are many ways in which Mr. Painter can enrich Mark's life.

For the reasons stated, we reverse the trial court and remand the case for judgment in accordance herewith.

REVERSED AND REMANDED.

All Justices concur except Thornton, J., who concurs in result.

APPENDIX C

Opinion of the District Court of Story County, Iowa

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COURT

This matter came on for hearing before the Court on plaintiff's petition in equity for a writ of habeas corpus. The petition was presented to the Court on June 3, 1965, by the plaintiff and a writ was issued and returnable at 1:30 p.m., on the 10th day of June 1965, at the courthouse at Nevada, Story County, Iowa, and on the 10th day of June 1965, the plaintiff appeared in person and by his attorney Donald R. Payer, Ames, Iowa, ready for trial, and the defendants appeared in person with their attorneys, Lundy, Butler, Wilson & Hall, of Eldora, Iowa, and on said date filed a motion for a continuance, stating that they had heretofore been represented by Smedal, Maurer & Brewer of Ames, Iowa; that said representation came to an end on the 8th day of June 1965, on which day the attorneys withdrew their appearance, and on the same day the defendants employed their present attorneys. In their motion for a continuance they alleged that they needed additional time to make the necessary investigations and to have the plaintiff examined by a psychiatrist, and that they wanted to take certain depositions. This motion for a continuance was resisted by the plaintiff, but the Court being fully advised in the premises, aware that the plaintiff had, at considerable inconvenience, made the trip from California to Nevada, Story County, Iowa, for the said trial, nevertheless the Court felt in fairness to the defendants that it was necessary to grant said continuance, and the case was continued for trial until the 12th day of July 1965, at 10:00 o'clock a.m.

Defendants filed their answer to plaintiff's petition on June 10, 1965, said answer being in three divisions, the fourth division being a counterclaim for appointment of a guardian.

This case came on for trial to the Court on July 12, 1965, the plaintiff appearing in person and by his attorney Donald R. Payer. The defendants appeared in person and with their counsel John L. Butler and Jack Hall of the firm of Lundy, Butler, Wilson & Hall of Eldora, Iowa, and the case proceeded to trial. Evidence was taken on the 12th day of July through and including the 16th day of July 1965. The Court having examined the pleadings carefully, having heard all the evidence adduced, having received briefs from both parties, (the parties waived oral argument at the conclusion of trial), having reviewed thoroughly the 28 exhibits introduced by the plaintiff, and the 52 exhibits introduced by the defendants, and being fully advised in the premises makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

This case was tried before the Court as an equitable proceeding, it being a proceeding involving the custody of a minor child, Mark Wendell Painter.

The action was brought by Harold W. Painter, as father and next friend of Mark Wendell Painter, and he will be referred to as plaintiff hereafter.

The defendants Dwight Bannister and Margaret Bannister are husband and wife, and residents of Story County, Iowa, they will be hereafter referred to as defendants.

The plaintiff Harold W. Painter is a man thirty-four years of age who resides at Walnut Creek, California, a suburb of San Francisco, California. His occupation is that of journalist, and he is presently employed by the Oakland Tribune, Oakland, California. He has followed this avocation since leaving San Francisco State College in the fall of 1955. The plaintiff has held seven or eight different jobs in the newspaper field since 1955, in varying capacities and for various salaries, his present salary being the highest attained so far.

The plaintiff was married to Jean Bannister, the eldest daughter of defendants, in Anchorage, Alaska, on April 6, 1957. At the time of their marriage they were both employed by the Anchorage Daily Times. On March 4, 1958, Mark Wendell Painter was born as issue of this marriage. A year and some months later a girl was born to these parties, and the family moved from Anchorage, Alaska, to Bremerton, Washington, then Moses Lake, Washington, then to Pullman, Washington, where the plaintiff was employed by the Washington State University, and it was during their stay in Pullman, Washington, that Jean, the wife of plaintiff, and the mother of Mark, departed this life on December 6, 1962, as a result of an automobile accident, and four days later the daughter, Janet, died as the result of injuries sustained in the same accident.

The Court finds that from the time of their marriage in 1957, until the death of the plaintiff's spouse, Jean, that they enjoyed a happy married life, and their children were well cared for; that the deceased, Jean, was a kind and loving mother and wife, and that they enjoyed a happy home life.

Naturally, the plaintiff was much upset, depressed and sorrow-laden after the tragedy within his family. He left Pullman, Washington, with his son Mark, and returned to Walnut Creek, California, to the home of his foster parents Mr. and Mrs. Leo McNelly. These foster parents had cared for the plaintiff from the time he was two and a half years of age, about which time his father and mother were divorced, and his natural parents are still alive, his natural mother being known in this record as Charlotte Betts. The plaintiff had tried his hand at free lance writing and photography, but found it necessary to take part time work and went back to work in the newspaper field in the spring of 1963. In the summer of 1963 the plaintiff arrived at a conclusion that his son, Mark, was not being properly cared for by the McNellys, at least not to his satisfaction, and requested the defendants to come to California and to take Mark back to Iowa with them and to start him in

school. The Court finds from all the evidence adduced in this case, although denied at times by the defendants, nevertheless that the arrangement was entirely a temporary basis and would continue until the plaintiff became settled in his own home with proper facilities to care for the minor son. The defendants came to California, took the grandson Mark back to Iowa to their home, Rural Route 1, Ames, Iowa, and entered the boy in school at Gilbert, Iowa, a small town north of the City of Ames, Iowa. During Mark's year in kindergarten he seems to have been somewhat of a problem, and the Court finds that the evidence shows that his problems were none other than that of a normal child of that age; that he improved greatly during the first year of school; that during that first year with the defendants, the plaintiff corresponded with his son, corresponded with the defendants, sent some money and gifts, and generally kept in touch with his son and his son's welfare.

In the summer of 1964 the plaintiff indicated his intentions to bring his son back to California because of an intended marriage. Plans were changed from time to time until the plaintiff did, in September 1964, make a visit to the defendants' home to visit his son and make arrangements for the return of his son to his custody. At this meeting in September of 1964, the plaintiff first learned that the defendants wanted to adopt Mark and wanted to keep him permanently. From this time on the relationship between the plaintiff and the defendants became strained, yet the plaintiff kept in constant conact with his son by letters and by phone calls. The plaintiff was married to Marylyn Hanson on November 28, 1964. They were married in a Catholic Church in Lafayette, California. This couple made immediate preparations to include Mark in their home life, and in the early part of June 1965, they came to Ames to return Mark to the home of his father. Here they met complete resistance from the defendants, and unfortunately, made an attempt to forcibly take the child from the school at Gilbert. Then came the application for the writ of habeas corpus.

The Court feels it necessary to make his findings as to the present Mrs. Marylyn Painter, wife of the plaintiff. She has a B. A. degree which she received in 1956, and had the honor of being Phi Beta Kappa. She has an M. A. degree received in 1964 in Graphic Arts. She has had considerable experience in working with children, and it appears to the Court that she would make a capable mother. She is a woman apparently in good health, thirty-one years of age.

From the evidence adduced and from the Court's interview with the minor, Mark Painter, it is apparent that Mark is a physically well developed boy seven years of age, considerably above average in mental abilities, pleasant, courteous and well behaved. From the evidence adduced it is apparent to the undersigned that Mark has many of his father's characteristics and exhibits a great deal of the good early training given him by his beloved mother.

The defendants, Mr. and Mrs. Dwight Bannister, live on an eighty acre farm north of Ames, Iowa, their mailing address being Route 1, Ames, but they are located in the Gilbert School District. Mr. Bannister is employed at Iowa State University and Mrs. Bannister is a housewife. The Bannisters are both sixty years of age and have raised four daughters to maturity. They have asserted in their testimony that they are worth $100,000.00. It cannot be questioned that the defendants have provided a very fine home for their grandson since he came to live with them in the late summer of 1963. In the evidence they have admitted and denied that they took Mark on a temporary basis, but now they both assert that they want to keep Mark desperately, and they both avow that the plaintiff is not suited to care for his son, Mark Painter. They also claim that the plaintiff has abandoned his son, but the Court finds to the contrary, that there is no abandonment involved in this lawsuit. Mr. and Mrs. Bannister admit that they never particularly cared for the plaintiff, and have stated that their daughter had an unhappy marriage. They came to

this conclusion by reading between the lines of her letters. However, the preponderance of the evidence adduced convinces the Court that Harold Painter and Jean Painter enjoyed a normal and happy marriage. Mr. Bannister admits that private investigators were hired since June of this year to investigate the plaintiff in California, and it appears to the Court that the defendants had wanted the custody of their grandson, Mark, since the death of their daughter, Jean. They have shown that they can give their grandson certain advantages, material and spiritual, and there is no question in the writer's mind they have in the past almost two years, done a great deal for, and have been a good influence on their grandson, Mark Painter. They have shown great love and affection for their grandson, even to excess, and they state that Mark has declared his preference to stay with them. The Court, in his interview of Mark did not ask the boy this question for obvious reasons.

The defendants offered a great deal of testimony in regard to the defendants and all of it was very good as to the defendants being good people, and the Court so finds; that they have provided well for Mark and that he has made normal improvement during his stay in their home. Many of these witnesses considered only one side of the case. The Court does not usually single out any one witness in a case, but he feels in this instance that comment should be made upon the evidence given by the expert, Dr. Hawkes. Dr. Hawkes testified he investigated this case for twenty-five hours, and concluded that it would be for the best interest of the boy to remain with the Bannisters. He also testified that he gave no consideration whatsoever to the biological father of the child, stating that the same was a mere accident and unimportant. The Court has given full consideration to the good doctor's testimony, but cannot accept it at full face value because of exaggerated statements and the witness' attitude on the stand.

In summary, the Court finds that the plaintiff, the father of Mark Painter, is a proper and fit person to have the

care and custody of his own minor son, and that it is for the best interests of the son, Mark Painter, to be reared and educated in his own father's home; that the father is the person to properly maintain his son and to properly educate him. In making this finding the Court does not cast any reflections upon defendants, Mr. and Mrs. Bannister. The Court knows they are good people, they have and did provide a good home for their grandson, but that the greater equities are with the plaintiff, he being the natural father of Mark, and there being no evidence that he is an unfit father, there being no evidence that he abandoned the child, the the Court being convinced that the grandson's stay with the Bannisters was originally on a temporary basis and that it is for the best interests of the child, Mark Painter, that he be placed permanently in the care and custody of his father.

CONCLUSIONS OF LAW

In child custody cases the law of Iowa has been many times stated by our highest Court, and they have faithfully followed the legal precepts and the moral precepts incumbent upon them. And they have stated, as this court has stated, that each case is dependent upon the factual situation, the law being well settled in this state, the Court will not trouble the parties by citing cases. However, the Court has re-read them in preparation of this case, having many times read them in several custody cases heretofore tried by this Court. The recent cast of Childres v. Childres sets forth the law very well, and the Court there wisely adapted the fact situation to the law, and we must always keep in mind the Iowa Statutes, Section 668. 1 and 2 of the 1962 Code of Iowa, which is now Section 559 of the new probate code, and of course, Rule 344(f) 15 of the Iowa Rules of Civil Procedure.

ORDER OF COURT

IT IS HEREBY ORDERED that the writ of habeas corpus issue and that the child, Mark Wendell Painter, shall

be delivered unto the permanent custody of his natural father, Harold W. Painter, and that the plaintiff shall draw all orders necessary, and that the defendants are ordered to deliver the child, Mark Wendell Painter, to his father, Harold W. Painter, forthwith.

The costs of this action shall be taxed to the defendants.

All to which the defendants are given their exception.

/s/ Ed J. Kelly
Judge of the Eleventh Judicial District.

APPENDIX D

IN THE SUPREME COURT OF IOWA

MARK WENDELL PAINTER,
a Minor, by HAROLD W. PAINTER,
his Father and Next Friend,
Plaintiff-Appellee,

vs.

DWIGHT BANNISTER and
MARGARET BANNISTER, Husband
and Wife,
Defendants-Appellants.

Appeal from Story District Court.

In this cause, the Court being fully advised in the premises, file their written opinion reversing and remanding the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby

REVERSED AND REMANDED FOR JUDGMENT IN ACCORDANCE HEREWITH

and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellee pay the costs of this appeal.

THE SUPREME COURT OF IOWA